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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 769

THE GEMEX CORPORATION, a New Jersey corporation,

Petitioner,

vs.

A. C. BECKEN CO., an Illinois corporation,

Respondent.

ANSWER OF RESPONDENT, A. C. BECKEN CO., TO PETITION OF GEMEX CORPORATION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Respondent's Comment on QUESTIONS PRESENTED in Petition for Certiorari.

The Record (App. 1 to 140) does not in any way support the questions Petitioner would like to inject into this case.

1. "Refusal to deal" was not the issue. The issue before the Court of Appeals was whether a manufacturer (the Petitioner Gemex) could refuse to sell to a wholesaler (the Respondent Becken) when the wholesaler would not join an existing combination between the manufacturer

and the wholesaler's principal competitors to fix and maintain minimum resale prices on the manufacturer's own products *and on the products of the manufacturer's competitors.* The Opinion and the Record clearly show the Petitioner went far beyond a simple refusal to deal, and was actually engaged in attempting to expand this existing price-fixing and maintenance combination by the use of coercion on Respondent. Petitioner refused to further sell to Respondent when Respondent declined to join this price-fixing combination (Record 21-25, 38, 39, 115, 116, Op. 3, 4).

2. The second question posed by Petitioner Gemex (p. 3 of the Petition) presumes "the absence of any evidence of conspiracy, combination or agreement to restrain commerce." This is not the record. The Court of Appeals found and held (Op. 3, 4) that Petitioner had warned Respondent that Respondent would be expected to sell lines competitive to Petitioner's lines, as well as Petitioner's own lines, at manufacturer-suggested prices, and that Petitioner *had already exacted such an agreement from Respondent's two principal competitors* for the maintenance of fixed prices on its own and its competitors' products. The Record shows this conclusively (App. 21 to 25, 38, 39, 115, 116, Op. 3, 4).

3. The Petitioner did not argue, in its Petition for Rehearing before the Court of Appeals, Question No. 3 stated on page 3 of its Petition for Certiorari. In addition, the Court of Appeals held (Op. 4) that this was not a "simple refusal to sell" case, but was one where the Petitioner, under the guise of refusal to sell, attempted to require a distributor of its products to enter into price fixing and maintenance agreements with it on its own and its competitors' lines, as a condition of Petitioner's further sale of its products to Respondent.

4. Question 4 presented by Petitioner (page 3 of Petition for Certiorari) is likewise not an issue for considera-

tion here. The Court of Appeals found (Op. 4) and the Record is, (App. 15 to 92, 115 and 116) that the Findings of Fact drafted by Petitioner were clearly erroneous and not supported by the Record and that the trial court was led into error in adopting them (Op. 4, 7, and Rule 52 (b) F.R.C.P.).

5. Question 5 presented by Petitioner (page 3 of its Petition for Certiorari) is likewise extraneous to the Record in this case. The Court of Appeals found (Op. 3, 4 and 7) that the Findings of Fact adopted by the trial court were not based upon the Record, and that the Record "clearly establishes" the facts stated on page 3 of its Opinion. There were no "inferences" drawn from the testimony in the Record.

6. The Court of Appeals found (Op. 2, 3, 4) that there was no testimony in the Record to support the trial court's findings "that a manufacturer's refusal to sell was not for the purpose of creating a monopoly, or for restraining competition", as is presupposed by Petitioner in Question 6, page 3 of its Petition for Certiorari.

7. The question stated by Petitioner at 7 on page 3 of the Petition for Certiorari was not presented in Petitioner's briefs in the Court of Appeals, was not argued there, and was not passed upon there.

The question itself, as presented, and the admission of counsel in the Petition for Certiorari (page 15) that "admittedly there were no minimum price contracts between Petitioner and distributor but assuming there were, they would be so excluded", demonstrates by itself, that Petitioner has no recourse here, or elsewhere, under the Illinois Fair Trade Act (CH 121½ Ill. Rev. Stat., Sec. 188, or under 15 USC, Sec. 45 (a) (2). The question is simply not in this case.

STATEMENT.

Respondent rejects the Petitioner's statement of the case. It is an attempt to rewrite and slant the Record the way the Petitioner would like to have it appear. The Record is (App. 21-25, 38, 39, 43, 115 and 116) and the Court of Appeals found (Op. 3, 4) that Petitioner Gemex attempted to force and compel the Respondent to enter into a price fixing combination and agreement between Petitioner and other wholesalers of its products for the establishment and maintenance of minimum resale prices on Gemex products and also on products competitive to the Gemex line (App. 21 to 25 and 38). Petitioner had already exacted such an agreement from Respondent's principal competitors, and so advised Respondent (App. 24, 38, 43 and 44). Petitioner threatened to drop Respondent as a distributor unless it joined in this already established price fixing agreement (Op. 3, 4 and App. 21 to 25, 115, 116). When Respondent refused to enter into such an agreement, and thus to join this price-fixing combination (App. 25, 38 and 115, 116, Op. 3, 4), Petitioner carried out its threat to drop Respondent as a distributor of Petitioner's products (App. 25, 38, 39, 115, 116, Op. 3, 4). The Court of Appeals found that this existing price-fixing plan was a violation of Section 1 of the Sherman Act (Op. 4).

Petitioner presented only one witness at the trial. Its only witness admitted that in the conference with Respondent at which Petitioner insisted that Respondent must join its plan to fix and maintain selling prices, he had "mentioned another line as well as mentioning Gemex" (App. 91). This confirmed and corroborated the testimony of the other witnesses at the trial that Respondent was dropped as a distributor by Petitioner because it would not join the Petitioner's existing illegal combination or conspiracy to fix and maintain minimum resale prices on

Petitioner's products and on products of Petitioner's competitors (App. 25, 38, 39, 115, 116, Op. 4).

Contrary to Petitioner's statement on pages 4 and 5 of its Petition for Certiorari that "Petitioner's representatives ascertained that Respondent was selling the Gemex brand line at discounts through its salesmen while maintaining the suggested resale price through its catalogue (App. 85), the only evidence in the record is that Petitioner's lone witness *said* to Respondent that he had *heard* that Respondent was selling Petitioner's merchandise at one price in the catalogue and at a discount through its salesmen (App. 85). Petitioner presented no proof whatsoever to substantiate this accusation. The Record, on the contrary, is that plaintiff never sold Gemex merchandise at less than factory-suggested prices (App. 20, 35, 50, 116, 117). The Record does not, therefore, support Petitioner's statement to this court on pages 4 and 5 of its Petition "that Respondent was selling the Gemex brand line at discounts through its salesmen while maintaining the suggested list resale price through its catalogues."

The Record is clear, also, that Respondent *was* selling a line competitive to Petitioner's line at lower than factory-suggested prices (App. 21). It was this practice which Petitioner sought to fix and control by trying to compel Respondent to adhere to the agreement which Petitioner had already made with Respondent's principal competitors to fix and maintain prices not only on Gemex products, but also upon competing lines made by other manufacturers (App. 21 to 25, 38, and 43, Op. 3). Respondent refused to enter into such an agreement, and thus to join this price fixing combination (App. 25, 38, 115, 116). Petitioner then carried out its threat to drop Respondent as a Gemex distributor (App. 25, 38, 39, 115, 116, Op. 4).

The Court of Appeals, on a review of the Record, found that the Record clearly established the foregoing facts (Op. 3), that such proof established a violation of Section 1 of the Sherman Act (Op. 4), and that the Findings of Fact by the District Court to the effect that this was a simple "refusal to deal" case were "clearly erroneous, under Rule 52 (b)" (Op. 4).

REASONS FOR DENYING THE WRIT.

There is no conflict with the "doctrine" announced in *United States* v. *Colgate & Co.*, 250 U. S. 300 (1919). As above shown, the Court of Appeals found, and held, that this was not a simple "refusal to deal", but was a clearly established price-fixing and maintenance plan and combination. "In the case at bar, the clearly established facts show a plan of operation adopted by defendant, the essential purpose of which was to limit the sale of its products to wholesalers who would agree not to sell below prices stipulated by defendant." (Op. 4). "The established facts (set forth on page 3 of the Opinion) also show that the refusal to continue plaintiff as a wholesaler of defendant's products was solely because plaintiff would not sell those products according to defendant's existing illegal plan of doing business in violation of Section 1 (of the Sherman Act). Plaintiff was not rejected as a customer by defendant because of any other reason. It follows that the facts alleged and established by the evidence state a cause of action under Section 1 of that Act. Findings of Fact by the District Court, inconsistent with these views, are clearly erroneous, under Rule 52 (b)" (F.R.C.P.) (Op. 4).

That is the whole case, on this Record (App. 1 to 140). The Petitioner's acts, being illegal *per se*, are, as Petitioner admits "not sanctioned by Colgate." (Petition, p. 4).

Any contract, agreement or combination entered into for the purpose and with the effect of raising, fixing, pegging or stabilizing the price of a commodity in interstate commerce is *per se* a violation of the Sherman Act.

Northern Pacific Railway Company v. *United States*, 356 U. S. 1, 4; 2 L. ed. 2d 545, 549 (1958);

Kiefer-Stewart Co. v. *Joseph E. Seagram and Sons, Inc.*, 340 U. S. 211, 213; 95 L. ed. 219, 223 (1951);

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Federal Trade Commission v. *Beech-Nut Packing Co.*, 257 U. S. 441;

United States v. *Parke, Davis and Company*, No. 20, October Term, 1959, United States Supreme Court, decided February 29, 1960, 28 Law Week 4150.

Petitioner attempted to compel Respondent to agree to fix and maintain prices on Petitioner's and its competitors' products (Op. 3, App. 21 to 25, 38, 43, 115, 116). It advised Respondent that it had talked to Respondent's competitors, who had agreed to thus fix and maintain prices. (Op. 3, App. 21 to 25, 38, 43). This was the "price-maintenance combination or conspiracy in violation of the Sherman Act" condemned by this Court on February 29, 1960 in *United States* v. *Parke, Davis and Company*, 28 L. W. 4150, No. 20, October Term, 1959 U. S. Sup. Ct., where this Court held that "if a manufacturer is unwilling

to rely on individual self-interest to bring about general voluntary acquiescence . . . and takes affirmative action" (if you don't join with me and your competitor wholesalers in fixing prices, I won't sell to you)* "to achieve uniform adherence by inducing each customer to adhere to avoid such price competition, the customers' acquiescence is not then a matter of individual free choice prompted alone by the desirability of the product. The product then comes packaged in a competition-free wrapping—a valuable feature in itself—by virtue of concerted action induced by the manufacturer. The manufacturer is thus the organizer of a price-maintenance combination or conspiracy in violation of the Sherman Act."

Having got Respondent's principal competitor-wholesalers to fix and maintain prices on Petitioner's own *and on its competitors'* products (App. 21 to 25 and 38, Op. 3), Petitioner sought to require Respondent to join this "price-maintenance combination or conspiracy in violation of the Sherman Act," as this Court put it in *United States* v. *Parke, Davis and Company, supra.* You there said that such "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.*" (Citing cases).

It follows, of course, as Petitioner concedes (Petition, p. 7), that where the price-maintenance combination or conspiracy is illegal *per se*, a unilateral refusal to deal is not sanctioned by Colgate.

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*Parenthetical material added.

It also follows that, being a *per se* violation of the Sherman Act, proof of public injury is not required.

Radovich v. *National Football League*, 253 U. S. 445, 453;
Crane Distributing Company v. *Glenmore Distilleries*, (C. A. 6, 267 Fed. 2d 343, 1959).

The identical factual situation shown by the Record in this case, and stated by the Court of Appeals in its Opinion (Op. 3) was involved in *Connecticut Importing Co.* v. *Frankfort Distilleries*, 101 Fed. 2d 79, 2nd Circuit, and in *Crane Distributing Co.* v. *Glenmore Distilleries*, 267 Fed. 2d 343, 6th Circuit, June 2, 1959. The decision of the Court of Appeals is not therefore in conflict with those of other circuits, or of this Court, on similar facts. In *United States* v. *Parke, Davis and Company*, No. 20, October 1959 Term, 28 Law Week 4150, decided by this Court on February 29, 1960, you similarly condemned a manufacturer's enforced combination to fix and maintain prices on its own products. Here, the Petitioner Gemex went even farther and organized and attempted to coerce Respondent into joining a combination to fix and maintain prices on its competitors' products, as well as on its own products. The only difference between those cases and this case is that there the manufacturer was trying to compel a distributor to fix and maintain resale prices on its own products, while here Gemex was trying to do that, not only on its own products, *but also on its competitors' products*. This is price-fixing and maintenance in its most vicious form.

"Acts to give effect to the conspiracy may be in themselves wholly innocent acts, yet if they are a part of the sum of the acts which are relied upon to effectuate the

conspiracy which the statute forbids, (price fixing) they come within its prohibitions."

American Tobacco Co. v. *United States*, 328 U. S. 781 (809).

United States v. *Parke, Davis and Company*, 28 L. W. 4150, No. 20, October Term, 1959 U. S. Supreme Court.

It is obvious from the foregoing that the District Court in this case, as in *Parke, Davis*, premised its ultimate finding that Petitioner Gemex did not violate the Sherman Act on an erroneous interpretation of the standard to be applied. The Petitioner is therefore not privileged to invoke Rule 52 (a). *U. S.* v. *Parke, Davis, supra.*

The Record also clearly establishes the facts found by the Court of Appeals on page 3 and the conclusions of law on page 4 of the Opinion. The Court of Appeals therefore correctly invoked Rule 52 (b), and its Opinion should be final.

We respectfully submit the Petition for Certiorari must be denied.

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